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No. 92-785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROCK CREEK LIMITED PARTNERSHIP,

Petitioner,

v.

STATE WATER RESOURCES CONTROL BOARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S RESPONSE TO THE BRIEF AMICUS CURIAE OF THE UNITED STATES

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The Acting Solicitor General's opposition to the petition for certiorari ("SG Brief") reflects a wholly idiosyncratic view of the principles governing the award of attorneys' fees, not shared by the courts below or, so far as we are aware, any other court. Contrary to this Court's decisions in the area and those of the lower courts, the Acting Solicitor General suggests that attorneys' fees for work in collateral proceedings are not recoverable unless the collateral proceeding is actually litigating the Section 1983 claim or unless the collateral proceeding leads to the entry of a specific affirmative judgment in the 1983 action. (SG Brief at

5-9). That is not the law, and the Acting Solicitor General's effort to rewrite the statute provides no basis for declining to review and resolve a persistent conflict.

1. The Acting Solicitor General argues that "the administrative proceedings at issue here were not proceedings 'to enforce' petitioner's civil rights claim" (SG Br. at 7), a rationale not articulated by either the Court of Appeals or the district court below. While it is quite true that the Federal Energy Regulatory Commission is not charged with adjudicating claims under Section 1983, that agency is charged with adjudicating the identical federal right that formed the basis of the claim here under Section 1983: the right of a federal licensee to operate its hypdropower plant in the manner prescribed in its Federal Energy Regulatory Commission license without interference from conflicting regulatory directives issued by the state. Decisions of this Court and the lower courts are uniform in confirming that an identity in federal rights asserted is sufficient to support an award of attorneys' fees for proceedings in collateral fora, and conflict only with regard to whether those proceedings must be mandated by statute or court order. *See, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (attorneys' fees awarded under Title VII for relief obtained in state court on employment discrimination claim under state law); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986)(fees properly awarded under Clean Air Act for efforts to protect Clean Air Act consent decree during state court litigation and in proceedings before the Environmental Protection Agency); *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985)(attorneys' fees awarded under Section 1988 after fee claimant's intervention and assertion of constitutional rights in action brought in state court under Illinois Motor Vehicle Code resulted in state court ruling invalidating state statute and ordering return of confiscated vehicles); *Chrapliwy v. Uniroyal*, 670 F.2d 760 (7th Cir. 1982)(attorneys' fees awarded under Title VII following collateral debarment proceeding brought pursuant to Executive Order 11246 raising employment discrimination claim), *cert. denied*, 461 U.S. 956 (1983). In each of these cases the court ruled that an award

of fees would be proper even though the collateral proceedings were not themselves proceedings under Section 1983 or other similar federal statutes.

2. The Acting Solicitor General places his sole reliance on *Webb v. Dyer County Bd. of Educ.*, 471 U.S. 234 (1985), as supposedly supporting his point. *Webb*, however, merely holds that, for purposes of "automatic" entitlement to attorneys' fees under Section 1988, "[a]dministrative proceedings established *to enforce tenure rights created by state law* . . . are not any part of the proceedings to enforce § 1983." 471 U.S. at 241 (emphasis added). *Webb* does *not* purport to determine that federal administrative proceedings brought, as here, to enforce the *federal right* on which the Section 1983 claim rests are not "proceedings to enforce § 1983" within the meaning of the fee-shifting statute.

3. The Acting Solicitor General also suggests that fees cannot be awarded unless the collateral proceeding leads to the entry of a specific affirmative judgment in the 1983 action. See SG Br. at 9 This Court, however, has expressly rejected such a position. In *Maher v. Gagne*, 448 U.S. 122 (1980), the Court considered whether attorneys' fees could be awarded under Section 1988 following settlement of a Section 1983 claim raising both a statutory claim on which a fee award was arguably barred by the Eleventh Amendment, and two constitutional claims not subject to Eleventh Amendment strictures. The Court concluded that neither the lack of a judgment on the merits, nor the claimant's presentation of an arguably "non-fee" claim, supported reversal of the lower courts' award of attorneys' fees. 448 U.S. at 129-33. In so holding, the Court relied on legislative history expressly stating that "attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact'")(quoting legislative history). *Id.* at 132 n.15. The Acting Solicitor General neither acknowledges the *Maher* holding nor explains why a different rule should apply on the mere fortuity that the "non-fee" judgment is

formally obtained in administrative proceedings rather than in the district court.

4. The Acting Solicitor General also asserts that "the decisions on which petitioner relies do not establish a conflict warranting review by this Court." (SG Br. at 9). Notably, he does not, and cannot, deny that the lower courts are in conflict regarding whether collateral proceedings must be mandated by statute or court order before fees are awardable. His contention instead that review is not warranted because petitioner's authorities "were decided before this Court's decision in *Webb*, which clarified the relevant principles" is incorrect because, as shown above, his reading of the law in this area fundamentally misstates the relevant principles. *Webb*, as noted, turns on the fact that the collateral proceeding in that case simply did not raise the federal right later asserted in the Section 1983 action. The collateral proceedings in this case raised just such a right, requiring the Ninth Circuit to decide whether fees nonetheless were not awardable in the absence of a statutory or court mandate referring the parties to an alternative forum. That is an important issue on which the circuits are divided, and on which resolution by this Court is important.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition and in the Reply Brief for Petitioner, certiorari should be granted.

Respectfully submitted,

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